Customs Bulletin

Regulations, Rulings, Decisions, and Notices concerning Customs and related matters

and Decisions

of the United States Court of Appeals for the Federal Circuit and the United States Court of International Trade

Vol. 18 FEBRUARY 29, 1984 No. 9

This issue contains:

THE DEPARTMENT OF THE TREASURY
U.S. Customs Service

NOTICE

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U.S. Customs Service

Treasury Decisions

19 CFR Part 24

[T.D. 84-41]

Interim Customs Regulations Amendment Regarding Collection of Medicare Compensation Costs

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Interim regulations.

SUMMARY: This document amends the Customs Regulations on an interim basis to allow Customs to include in charges assessed to parties-in-interest for reimbursable services provided by Customs officers, Medicare compensation costs equal to 1.3 percent of the assessed amount. The inclusion of these costs in assessed charges will result in at least partial recovery of Customs' cost of matching employees' statutorily mandated contribution for Medicare coverage. The estimated recovery of Medicare costs by Customs is approximately $500,000 annually.

EFFECTIVE DATE: April 16, 1984.

COMMENTS: This regulation is being published on an interim basis, effective (60 days from the date of publication in the Federal Register). However, written comments received before April 16, 1984 will be considered in determining whether any changes to the regulation are required before a permanent rule is published.

FOR FURTHER INFORMATION CONTACT: James Kenny, Headquarters Accounting Division (202-566-2021), U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229.

SUPPLEMENTARY INFORMATION:

Background

Various statutes provide Customs with the administrative authority to charge fees to recover the costs of a particular service rendered. For example, 19 U.S.C. 58a provides that the Secretary of the Treasury may charge such fees as may be necessary to recover

the costs of providing certain vessel services. The fees are to be consistent with the User Charge Statute (31 U.S.C. 9701). Section 4.98(a), Customs Regulations (19 CFR 4.98(a)), sets forth the specific services and bases for calculating each flat fee. Similarly, Customs charges and bills parties-in-interest for reimbursement in connection with services rendered by Customs officers or employees during regular hours (see section 24.17, Customs Regulations (19 CFR 24.17)), or on Customs overtime assignments under 19 U.S.C. 267 or 1451 (see section 24.16, Customs Regulations (19 CFR 24.16)). The bills cover full compensation and/or travel and subsistence of the Customs officer performing the service.

The User Charge Statute provides that each service or thing of value provided by an agency to a person is to be self-sustaining to the extent possible. The head of an agency may prescribe regulations establishing the charge for a service or thing of value provided by the agency. Regulations so prescribed are subject to policies prescribed by the President and shall be as uniform as practicable. Each charge shall be fair and based on the costs to the Government, the value of the service or thing to the recipient, public policy or interest served, and other relevant facts. The statute does not affect a law prohibiting the determination and collection of charges and the disposition of those charges, and prescribing bases for determining charges, but a charge may be redetermined under the statute consistent with the prescribed bases.

Congress, by passage of the Tax Equity and Fiscal Responsibility Act of 1982 (Pub. L. 97-248, Sept. 3, 1982, 96 Stat. 324), extended Medicare coverage to federal employees not otherwise subject to Social Security withholding taxes. As a result of the legislation, 1.3 percent of a federal employee's wages are withheld for Social Security and that amount is matched by the Government. Both regular and overtime wages are subject to the withholding tax. Customs is currently making the matching payments for the 1.3 percent Medicare compensation program for salaries paid Customs employees for reimbursable services they provide for parties-in-interest. It is estimated that the Customs share of these payments amounts to approximately $500,000 annually.

Although the Tax Equity and Fiscal Responsibility Act does not provide specific language providing for reimbursement of the 1.3 percent amount by parties-in-interest, Customs is of the opinion that authority to collect such monies is provided by title 31, United States Code, section 9701 (User Charge Statute), and title 19, United States Code, sections 267 and 1451 (Customs overtime provisions). Further, passing such charges on to those who actually benefit from the services provided would be in keeping with the Administration's policy in this regard.

COMMENTS

Before adopting the regulation as a permanent rule, consideration will be given to any written comments timely submitted to the Commissioner of Customs. Comments submitted will be available for public inspection in accordance with section 103.11(b), Customs Regulations (19 CFR 103.11(b)), on normal business days between the hours of 9:00 a.m. to 4:30 p.m. at the Regulations Control Branch, Customs Service Headquarters, Room 2426, 1301 Constitution Avenue, NW., Washington, D.C. 20229.

INAPPLICABILITY OF NOTICE PROVISION

Because of the on-going loss of revenue caused by the current inability to collect these monies from parties-in-interest, it has been determined that, pursuant to 5 U.S.C. 553(b)(3)(B), notice and public procedure are inapplicable and unnecessary.

E.O. 12291 AND REGULATORY FLEXIBILITY ACT

Inasmuch as Customs does not believe that the amendment meets the criteria for a "major rule" within the meaning of section 1(b) of E.O. 12291, a regulatory impact analysis has not been prepared.

Pursuant to the provisions of section 5 of the Regulatory Flexibility Act (Pub. L. 96-354, 5 U.S.C. 601 *et seq.*), it is hereby certified that the regulation will not have a significant economic impact on a substantial number of small entities within the meaning of the Act. Accordingly, the amendment is not subject to the regulatory analysis or other requirements of 5 U.S.C. 603 and 604.

DRAFTING INFORMATION

The principal author of this document was Larry L. Burton, Regulations Control Branch, Office of Regulations and Rulings, U.S. Customs Service. However, personnel from other Customs offices participated in its development.

LIST OF SUBJECTS IN 19 CFR PART 24

Accounting, claims, Customs duties and inspection, imports, taxes, wages.

AMENDMENT TO THE REGULATIONS

Section 24.17, Customs Regulations (19 CFR 24.17), is amended by adding a new paragraph (f), as set forth below:

§ 24.17 Other services of officers; reimbursable.

(f) *Medicare Compensation Costs.* In addition to other expenses and compensation chargeable to parties-in-interest as set forth in this section, such persons shall also be required to reimburse Customs in the amount of 1.3 percent of the reimbursable compensa-

tion expenses incurred. Such payment will reimburse Customs for its share of Medicare costs.

(Pub. L. 97-248, Sept. 3, 1982, 96 Stat, 324; 31, U.S.C. 9701 (19 U.S.C. 267 and 1451))

ROBERT P. SCHAFFER,
Acting Commissioner of Customs.

Approved: January 24, 1984.
JOHN M. WALKER, JR.,
Assistant Secretary of the Treasury.

[Published in the Federal Register, February 14, 1984 (49 FR 5607)]

19 CFR PART 24

(T.D. 84-42)

Customs Regulations Amendment Relating to Acceptance of Uncertified Checks From Customhouse Brokers

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule.

SUMMARY: The Customs Regulations provide that an uncertified check drawn by an interested party shall be accepted by Customs for the payment of duty provided certain conditions are met. An uncertified check, drawn by a customhouse broker (broker) licensed in a district where an entry for merchandise is filed on behalf of an importer, shall be accepted by Customs for the deposit of estimated duties. This document amends the regulations to provide that a broker, not licensed in the district where an entry is filed, also is an interested party for the purpose of acceptance of such broker's own uncertified check for the deposit of estimated duties for the entry transactions on behalf of an importer, provided the broker has on file a power of attorney which is unconditioned geographically for the performance of ministerial acts. Customs may look to the principal (importer) or to the surety should the check be dishonored. The purpose of this amendment is to relieve brokers of the unnecessary burden of requiring them to submit certified checks.

EFFECTIVE DATE: March 15, 1984.

FOR FURTHER INFORMATION CONTACT: Jerry Laderberg, Entry, Licensing and Restricted Merchandise Branch, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229 (202-566-5765).

SUPPLEMENTARY INFORMATION:

BACKGROUND

Section 141.1(b), Customs Regulations (19 CFR 141.1(b)), provides, in part, that the liability for duties, both regular and additional, attaching on importation constitutes a personal debt due from the importer constitutes a personal debt due from the importer to the United States. An "importer", as defined in section 101.1(k), Customs Regulations (19 CFR 101.1(k)), means the person primarily liable for the payment of any duties or an authorized agent acting on his behalf.

Section 111.1(b), Customs Regulations (19 CFR 111.1(b)), defines customhouse broker to mean a person who is licensed under Part 111 to transact Customs business on behalf of others.

Pursuant to section 111.2, Customs Regulations (19 CFR 111.2), a broker must obtain a separate license to transact the business of a broker, for each Customs district in which he desires to conduct business.

Section 24.1(a)(3), Customs Regulations (19 CFR 24.1(a)(3)), which relates to the collection of Customs duties, taxes, and other charges provides that an uncertified check drawn by an interested party on a national or state bank or trust company of the United States, shall be accepted by Customs if the check is acceptable for deposit by a Federal Reserve bank, branch Federal Reserve bank, or other designated depository. Further, an uncertified check can be accepted only if there is on file with the district director an entry bond or other bond to secure the payment of the duties, taxes, or other charges, or if a bond has not been filed, the organization or individual drawing and tendering the uncertified check has been approved by the district director to make payment in this manner. Section 24.1(a)(3) also provides that in determining whether an uncertified check shall be accepted in the absence of a bond, the district director shall use available credit data obtainable without cost to the Government, such as that furnished by banks, local business firms, better business bureaus, or local credit exchanges, sufficient to satisfy him of the credit standing or reliability of the drawer of the check.

Under this regulation, an uncertified check, drawn by a broker licensed in a district where an entry for merchandise is filed on behalf of an importer, shall be accepted by Customs for deposit of estimated duties. However, a question has been raised as to whether a broker, tendering an uncertified check to Customs for deposit of estimated duties for entries filed by another broker on behalf of an importer in a district in which the tendering broker is not licensed, is an authorized agent of the importer and therefore, an interested party for the purpose of the acceptance of the payment by Customs.

In a ruling dated March 11, 1982, Customs held that a broker not licensed in a district where an entry is filed is an authorized agent of the importer for the purpose of acceptance of the broker's uncer-

tified check for the deposit of estimated duties for entry transactions made by another broker on behalf of the importer if the unlicensed broker holds a power of attorney from the importer which is unconditioned geographically for the performance of ministerial acts.

Traditionally, most powers of attorney are limited geographically to particular districts, districts in which the importer is importing merchandise. In order to allow a broker to tender an uncertified check in districts in which he is not qualified, an unlimited power of attorney from the client-importer is necessary.

This ruling relieves a broker of an unnecessary burden in that the broker, not licensed in a district in which his client may file an entry, would no longer always be required to obtain a certified check for the payment of duties.

Customs believes it is necessary to incorporate the holding of this ruling into section 24.1 to assure uniformity of application by district directors and better inform brokers and broker associations of this practice.

In this regard, on May 16, 1983, Customs published a document in the Federal Register (48 FR 21965) proposing to amend section 24.1(a)(3) to provide that a broker, not licensed in the district where an entry is filed, is an interested party for the purpose of acceptance of such broker's own uncertified check for the deposit of estimated duties of entry transactions provided the broker has on file the necessary power of attorney which is unconditioned geographically for the performance of ministerial acts. Customs may look to the principal (importer) or to the surety should the check be dishonored.

Commenters had until July 15, 1983, to submit comments. After considering the comments received in response to the proposal and further review of the matter, Customs has determined to adopt the final rule, as proposed.

Discussion of Comments

One commenter supports the proposal because it will ease the handling of shipments for all parties involved in the importation of merchandise.

Another commenter suggests that there is no need to implement the proposal now in light of Customs proposal relating to the revised bond structure. Customs does not believe we should wait for the bond proposal to be implemented, but should proceed with the uncertified check proposal now.

A third commenter notes that Customs would have difficulty in verifying if a broker were licensed in another district or had a power of attorney for the importer. Customs recognizes this but believes the party tendering the uncertified check should be required to verify to a Customs field office that he is qualified.

One commenter believes that adoption of the proposal would authorize a broker to transact Customs business in a district without a license. Customs considered this point but rejected this argument in its ruling of March 11, 1982.

This commenter also suggests that the district director should have the authority to require certified checks (rather than uncertified checks) to be filed when deemed necessary, such as when uncertified checks deposited by a broker have been returned unpaid.

Customs believes this comment has merit. The regulations provide that an uncertified check shall be accepted if there is on file with the district director a bond to secure payment of the duty or if a bond has not been filed, the organization or individual drawing and tendering the uncertified check has been approved by the district director to make payment in such matter. However, the mandatory nature of Customs acceptance of uncertified checks is beyond the scope of this document. Customs will consider this aspect in a separate document.

One commenter supports the proposal but is opposed to the idea that the broker must have an unlimited power of attorney from a client to have uncertified checks accepted in a district in which he is not licensed.

Customs disagrees. As noted above, most powers of attorney are limited geographically to particular districts. To allow a broker to tender an uncertified check in districts in which he is not qualified, an unlimited power of attorney from the client-importer is necessary.

Executive Order 12291

This document does not meet the criteria for a "major rule" as specified in section 1(b) of E.O. 12291. Accordingly, no regulatory impact analysis has been prepared.

Regulatory Flexibility Act

Pursuant to the provisions of section 605(b) of the Regulatory Flexibility Act (Pub. L. 96-354, 5 U.S.C. 601 *et seq.*), it is hereby certified that the regulations set forth in this document will not have a significant economic impact on a substantial number of small entities. Accordingly, it is not subject to the regulatory analysis or other requirements of 5 U.S.C. 604.

Drafting Information

The principal author of this document was Charles D. Ressin, Regulations Control Branch, U.S. Customs Service. However, personnel from other Customs offices participated in its development.

List of Subjects in 19 CFR Part 24

Customs duties and inspection, Imports, Accounting.

AMENDMENTS TO THE REGULATIONS

Section 24.1(a)(3), Customs Regulations (19 CFR 24.1(a)(3)), is amended as set forth below.

ALFRED R. DE. ANGELUS,
Acting Commissioner of Customs.

Approved: January 24, 1984.
JOHN M. WALKER, JR.,
Assistant Secretary of the Treasury

[Published in the Federal Register, February 14, 1984 (49 FR 5605)]

PART 24—CUSTOMS FINANCIAL AND ACCOUNTING PROCEDURE

§ 24.1(a)(3), Customs Regulations (19 CFR 24.1(a)(3)), is amended by adding a new sentence at the end of the paragraph to read as follows:

§ 24.1 Collection of Customs duties, taxes, and other charges.

(a) * * *

(3) * * * For purposes of this paragraph, a customhouse broker, not licensed in the district where an entry is filed, is an interested party for the purpose of Customs acceptance of such broker's own check, provided the broker has on file the necessary power of attorney which is unconditioned geographically for the performance of ministerial acts. Customs may look to the principal (importer) or to the surety should the check be dishonored.

(R.S. 251, as amended (19 U.S.C. 66), section 1, 19 Stat. 247 249 (19 U.S.C. 197); section 1, 36 Stat. 965 (19 U.S.C. 198), section 624, 46 Stat. 759 (19 U.S.C. 1624), section 641, 46 Stat. 759, as amended (19 U.S.C. 1641), section 648, 46 Stat. 762 (19 U.S.C. 1648)).

(T.D. 84-43)

Approval of Public Gauger Performing Gauging Under Standards and Procedures Required by Customs

Notice is given pursuant to the provisions of section 151.43, Customs Regulations (19 CFR 151.43), that the application of Charles V. Bacon, Inc., 730 Barataria Boulevard, Marrero, Louisiana 70072, to gauge imported petroleum and petroleum products in all Customs Districts, in accordance with the provisions of section 151.43, Customs Regulations, is approved.

Dated: February 10, 1984.

DONALD W. LEWIS,
Director,
Entry Procedures and Penalties Division.

(T.D. 84-44)

Approval of Public Gauger Performing Gauging Under Standards and Procedures Required by Customs

Notice is given pursuant to the provisions of section 151.43, Customs Regulation (19 CFR 151.43), that the application of Halcyon Transport Corporation, 1121 Walker Street, Houston, Texas 77002, to gauge imported petroleum and petroleum products in the Customs District of Houston, in accordance with the provision of section 151.43, Customs Regulations, is approved.

Dated: February 10, 1984.

DONALD W. LEWIS,
Director,
Entry Procedures and Penalties Division.

(T.D. 84-45)

General Notice

Fees Relating to Vessel Services, Container Stations, and Warehouses

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: General notice.

SUMMARY: To return to the Government the approximate costs of certain services provided by Customs officers, this document sets forth revised fees to be collected for the following services:

1. Fees to perform vessel services;
2. Fee to establish container stations; and
3. Fees to establish, alter, and relocate a warehouse facility.

The fees are being adjusted because of the January, 1984, Federal pay increase. The fees shall remain in effect until revised.

EFFECTIVE DATE: February 21, 1984.

FOR FURTHER INFORMATION CONTACT: John Holl, Office of Inspection and Control, U.S. Customs Service, 1301 Constitution Avenue, N.W., Washington, D.C. 20229 (202-566-8151).

SUPPLEMENTARY INFORMATION:

BACKGROUND

Fees To Perform Vessel Services

Public Law 95-410, the "Customs Procedural Reform and Simplification Act of 1978," approved October 3, 1978, (the "Act"), repealed sections 2654, 4381, 4382, and 4383 of the Revised Statutes of the United States (19 U.S.C. 58; 46 U.S.C. 329, 330, and 333), the statutory authority under which Customs had been charging and

collecting fees for specific services provided to vessels by Customs officers.

Because these "Navigation Fees," which are set forth in section 4.98(a), Customs Regulations (19 CFR 4.98(a)), did not cover the costs of providing the services, section 214 of the Act authorized the Secretary of the Treasury to establish a new schedule of fees to be charged and collected for furnishing these services. The fees are to be consistent with 31 U.S.C. 9701, which provides that the costs of specific services for private interests shall be reimbursed to the Government.

By Treasury Decision 80-25, published in the Federal Register on January 18, 1980 (45 FR 3570), Customs established a fee schedule to be used for 1980, and amended section 4.98(a), Customs Regulations, to provide that a revised fee schedule will be published in the Federal Register and CUSTOMS BULLETIN in December of each year setting forth navigation fees for the specified vessel services to be performed during the following year. The revised fee schedule is to reflect changes in the rate of compensation paid to the Customs officer performing the service. The fees are to be calculated in accordance with section 24.17(d), Customs Regulations (19 CFR 24.17(d)), and based upon the amount of time the average service requires of a Customs officer in the fifth step of GS-9.

In a separate regulatory initiative, Customs will amend section 4.98(a) to remove the requirement that the revised fee schedule be published in December of each year. That requirement is too restrictive, especially since there was no Federal pay increase in October 1983. As amended, section 4.98(a) will provide that a revised fee schedule will be published "periodically" and will remain in effect until changed. That is consistent with the procedure followed in the publication of a fee charged to establish a container station in accordance with T.D. 83-56 (48 FR 9853, March 9, 1983), and discussed below.

Because of the Federal pay increase effective January 8, 1984, it is necessary for Customs to revise the schedule of fees to take into account this increased cost. The hourly rate used is $15.60, thereby reflecting the change in the rate of compensation paid to a Customs officer in the fifth step of GS-9 performing the service. The fees have been rounded off to the nearest tenth of a dollar.

ACTION

The following revised schedule of navigation fees shall remain in effect until revised:

Fee No. and description of services	Fee
1. Entry of vessel, including American, from foreign port:	
(a) Less than 100 net tons	$7.80
(b) 100 net tons and over	15.60

Fee No. and description of services	Fee
2. Clearance of vessel, including American to foreign port:	
(a) Less than 100 net tons	7.80
(b) 100 net tons and over	15.60
3. Issuing permit to foreign vessel to proceed from district to district, and receiving manifest	15.60
4. Receiving manifest of foreign vessel on arrival from another district, and granting a permit to unlade	15.60
5. Receiving post entry	7.80
6. Reserved	
7. Certifying payment of tonnage tax for foreign vessels only	3.90
8. Furnishing copy of official document, including certified outward foreign manifest, and others not elsewhere enumerated	15.60

Fee To Establish Container Stations

Consistent with 31 U.S.C. 9701 (as recodified), by T.D. 83-56, Customs amended section 19.40, Customs Regulations (19 CFR 19.40), to authorize implementation of a fee schedule to establish a container station. The fee schedule is to be published in the Federal Register and Customs Bulletin periodically to revise the fee to reflect the increased costs to establish the container station. The fee is to be calculated in accordance with section 24.17(d), Customs Regulations. The published revised fee schedule will remain in effect until revised.

The fee charged for the service is based upon the amount of time the service requires of each Customs officer and equals the sum of the individual charges plus a charge for mileage incurred by the applicable Customs officer in using a vehicle to visit the premises to perform his or her respective task. The average mileage associated with performing the necessary tasks is 60 miles. Currently, mileage costs are reimbursed at 20.5 cents per mile.

The (1) grade and step of each Customs officer performing his or her respective service; (2) the adjusted hourly rate of pay utilized; (3) the individual charge of each respective service based on the hourly rate of pay of each Customs officer performing his or her respective service; and (4) the total fee, including mileage, for the service rendered rounded off to the nearest dollar follow:

430-213 O - 84 - 2

ACTION

Fee To Establish a Container Station

Customs officer, grade/step	Adjusted hourly rate	Individual charge
1. Clerk, 5/5	$10.29	$51.45
2. Inspector, 11/5	18.88	264.32
3. Agent, 12/5	22.62	497.64
4. Administrator, 13/5	26.89	53.78

The mileage fee is $12.30 (60 miles×20.5 cents). The total fee to establish a container station is $879.00 ($867.19+12.30, rounded off). The fee shall remain in effect until revised.

Fee To Establish, Alter, and Relocate a Warehouse Facility

By T.D. 82-204, published in the Federal Register on November 1, 1982 (47 FR 49355), Customs amended its regulations to implement changes relating to the control of merchandise in Customs' bonded warehouses by establishing an audit-inspection program.

As amended, section 19.5, Customs Regulations (19 CFR 19.5), provides that each warehouse proprietor will be charged a fee to establish, alter, or relocate a warehouse facility which shall be determined under 31 U.S.C. 9701. Each warehouse proprietor granted the right to operate a warehouse facility shall be charged an annual fee which shall be determined under section 555, Tariff Act of 1930, as amended (19 U.S.C. 1555). The fees will be revised annually and published in the Federal Register and CUSTOMS BULLETIN.

The purpose of the annual warehouse fee is to reimburse the Customs appropriation for services rendered to the warehouse community including audit, inspection, and related administrative costs, and is to be projected on the basis of the actual annual cost to Customs in the preceding year plus any Federal salary increases. The current annual fee is $650.00. Any increase in that fee will be the subject of another Federal Register document.

To recover the increased costs to Customs, the fees are to be calculated in accordance with section 24.17(d), Customs Regulations.

ACTION

The following fee schedule to establish, alter, and relocate a warehouse facility shall remain in effect until revised:

1. Establish a Bonded Warehouse—$879.00
2. Alter an Existing Bonded Warehouse—$382.00
3. Relocate an Existing Bonded Warehouse—$382.00

The fees have been rounded off to the nearest dollar.

AUTHORITY

(R.S. 251, as amended (19 U.S.C. 66), section 312, 46 Stat. 692, as amended (19 U.S.C. 1312), section 551, 46 Stat. 742, as amended (19 U.S.C. 1551), section 555, 46 Stat. 743, as amended (19 U.S.C. 1555), section 624, 46 Stat. 759 (19 U.S.C. 1624), section 22, 67 Stat. 520 (19 U.S.C. 1646a), 92 Stat. 888 (Pub. L. 95-410), 96 Stat. 1051 (31 U.S.C. 9701).)

DRAFTING INFORMATION

The principal author of this document was Charles D. Ressin, Regulations Control Branch, Office of Regulations and Rulings, U.S. Customs Service. However, personnel from other Customs offices participated in its development.

GEORGE C. CORCORAN, JR.,
Acting Commissioner of Customs.

Approved: January 24, 1984.
JOHN M. WALKER, JR.
Assistant Secretary of the Treasury

[Published in the Federal Register, February 21, 1984 (49 FR 6433)]

Recent Unpublished Customs Service Decisions

The following listing of recent administrative decisions issued by the U.S. Customs Service is published for the information of Customs officers and the importing community. Although the decisions are not of sufficient general interest to warrant publication as Customs Service Decisions, the listing describes the issues involved and is intended to aid Customs officers and concerned members of the public in identifying matters of interest which recently have been considered by the U.S. Customs Service. Individuals to whom any of these decisions would be of interest should read the limitations expressed in 19 CFR 177.9(c).

A copy of any decision included in this listing, identified by its date and file number, may be obtained through use of the microfiche facilities in Customs reading rooms or if not available through those reading rooms, then it may be obtained upon written request to the Office of Regulations and Rulings, Attention: Legal Retrieval and Dissemination Branch, Room 2404, U.S. Customs Service, 1301 Constitution Avenue, N.W., Washington, D.C. 20229. Copies obtained from the Legal Retrieval and Dissemination Branch will be make available at a cost to the requester of $0.15 per page. Requests for copies must be accompanied by payment in the appropriate amount by check or money order. The cost per ruling (number of pages multiplied by $0.15) is indicated in the right hand column listed below.

The microfiche referred to above contains rulings/decisions published or listed in the CUSTOMS BULLETIN; many rulings predating the establishment of the microfiche system, and other rulings/decisions issued by the Office of Regulations and Rulings. This microfiche is available at a cost of $0.15 per sheet of fiche. In addition, a keyword index fiche is available at the same cost ($0.15) per sheet of fiche.

Addtions to both sets of fiche are made quarterly. Requests for subscriptions to the microfiche should be directed to the Legal Retrieval and Dissemination Branch. Subscribers will automatically receive updates as they are issued and will be billed accordingly.

Dated: February 14, 1984.

MARVIN M. AMERNICK
(For B. James Fritz, Director,
Regulations Control and Disclosure Law Division.)

Date of decision	Control No.	Issue	Number of pages	Cost
Please note: Prepayment is required for copies of rulings listed below.				
12-20-83	071455	Classification: T-shirts with designs imprinted upon them in the Virgin Islands are not products of the Virgin Islands for purposes of General Headnote 3(A), TSUS and are fully dutiable.	3	$0.45
12-14-83	071585	Classification: Niacinamide, an animal feed grade product is classifiable under the alterations provision of item 806.20, TSUS	2	.30
12-16-83	073553	Classification: Calcium-stearoyl-2-lactylate (CSL) and sodium-stearoly-2-lactylate (SSL), used as emulsifying agents, are classifiable as surface active agents in item 465.95, TSUS	1	.15
11-28-83	073260	Classification: Certain napkins and place mats with ½-inch fringe are classifiable in item 365.78, TSUS	1	.15
11-28-83	073087	Classification: Artificial flowers that are permanently secured in a basket are classifiable in item 389.62, TSUS	4	.60
12-21-83	106231	Vessels: The processing of coke at foreign ports to reduce it in size to meet specific customers' specifications does not create a new and different product to break the continuity of transportation between domestic ports for the purposes of 46 U.S.C. 883	3	.45
12-12-83	106425	Vessels: Coastwise laws are violated when a foreign-built, foreign flag vessel collects donated articles from U.S. ports and delivers them to a relief mission to another U.S. coastwise point (46 U.S.C. 883, 46 U.S.C. 289)	3	.45
12-12-83	106424	Vessels: The replacement of bumper pads by work performed in a foreign country constitutes a modification to the hull and fittings rather than equipment and repairs within the meaning of 19 U.S.C. 1466	2	.30
12-12-83	106450	Vessels: The Concrete Island Drilling System is a vessel, for purposes of dutiability, and is not subject to duty pursuant to General Headnote 5(f), TSUS	3	.45

Date of decision	Control No.	Issue	Number of pages	Cost
12-19-83	106534	Vessels: Acquisition of dual citizenship by a vessel owner is not a sale foreign of the vessel so that it would lose coastwise eligibility under the first proviso of 46 U.S.C. 883.	4	.60

ERRATUM

In Customs Bulletin, Vol. 18, No. 5, dated February 1, 1984, "FRONT COVER" should read: "C.S.D. 84-1 through 84-15"

Also, on page 29 through the top of page 32, "C.S.D. 84-14", was printed twice, please disregard one of the above mentioned decisions.

U.S. Court of Appeals for the Federal Circuit

(Appeal No. 83-1177)

ROHM & HAAS COMPANY, APPELLANT *v.* UNITED STATES, APPELLEE

(Decided February 9, 1984)

William D. Outman, II, of Washington, D.C., argued for appellant. With him on the brief were *Albert J. Bartosic* and *Munford Page Hall, II.*

John J. Mahon, of New York, New York, argued for appellee. With him on the brief were *J. Paul McGrath,* Assistant Attorney General *David M. Cohen,* Director and *Joseph I. Liebman,* Attorney in Charge International Trade Field Office.

[Appealed from Court of International Trade Judge Landis.]

Before FRIEDMAN, RICH, and SMITH, *Circuit Judges.*

FRIEDMAN, *Circuit Judge.*

This is an appeal from a decision of the Court of International Trade sustaining the classification of the imported merchandise by the District Director of Customs at the Port of New York. We affirm.

I

The issue in this case is the proper classification for Customs purposes of sheets of acrylic resin imported from Taiwan. The Customs Service classified the merchandise under item 771.41 of the Tariff Schedules of the United States as "flexible" plastic sheets and admitted them duty-free under the General System of Preferences as products from Taiwan. *See* 19 U.S.C. § 2461-2465 (1982); 19 U.S.C. § 1202 (1982) (General Headnote 3(c) to the Tariff Schedules).

The appellant, which manufactures a similar product which it sells in the United States under the trademark "Plexiglas," filed with the Customs Service pursuant to 19 U.S.C. § 1516 (1982) a petition challenging that classification. The appellant contended that the merchandise should have been classified as "sheets * * * of acrylic resin" "other" than "flexible" under item 771.45, and subjected to the duty prescribed for that item. The Customs Service denied the petition and appellant filed the present suit in the Court of International Trade to set aside that determination.

After a trial, the Court of International Trade sustained the classification. The court followed the prior decision of the Customs

Court in *Sekisui Products, Inc.* v. *United States,* 63 Cust. Ct. 123 (1969), which held that the common meaning of "flexible" in item 771.42 (the forerunner of item 771.41) is the dictionary definition: "capable of being flexed: capable of being turned, bowed, or twisted without breaking. * * * Flexible is applicable to anything capable of being bent, turned, or twisted without being broken and with or without returning of itself to its former shape."

The Court of International Trade held that "Congress has chosen not to amend the law to define 'flexible' in a commercial designation even though made specifically aware of the *Sekisui* decision and its ramifications." It ruled that the appellant "failed to prove that the term 'flexible' has a commercial designation based on a trade understanding of the term 'flexible' which differs from its common meaning and is not in conflict with clearly manifested legislative intent." The court concluded that the appellant "has failed to demonstrate a contrary legislative intent other than the common meaning of the term 'flexible' [and] has also failed to show through plenary proof a definite, general and uniform commercial designation."

II

A. "The meaning of a tariff term is presumed to be the same as its common or dictionary meaning in the absence of evidence to the contrary." *Bentkamp v. United States,* 40 CCPA 70, 78 (1952), *quoted with approval in United States v. C. J. Tower & Sons,* 48 CCPA 87, 89 (1961). One who argues that a term in the tariff laws should not be given its common or dictionary meaning must prove that "there is a different commercial meaning in existence which is definite, uniform, and general throughout the trade." *Moscahlades Bros. v. United States,* 42 CCPA 78, 82 (1954). The concept of commercial designation "was intended to apply to cases where the trade designation is so universal and well understood that the Congress, and all the trade, are supposed to have been fully acquainted with the practice at the time the law was enacted." *Jas. Akeroyd & Co. v. United States,* 15 Ct. Cust. App. 440, 443 (1928). "Proof of commercial designation is a question of fact to be established in each case." *S.G.B. Steel Scaffolding & Shoring Co. v. United States,* 82 Cust. Ct. 197, 206 (1979) (and cases there cited).

As noted, the Court of International Trade ruled that the appellant had not proved that "the term 'flexible' has a commercial designation based on a trade understanding of the term 'flexible' which differs from its common meaning * * *." Based upon our review of the record in light of the principles governing the determination of commercial meaning set forth above, we cannot reject that finding as clearly erroneous.

The appellant's expert witness, Reinhart, whom the court described as "possess[ing] excellent qualifications indicating a lifelong career devoted to researching and evaluation plastic materi-

als," had been the chairman of a subgroup at the American Society for Testing and Materials, an organization Reinhart called "the largest and probably the most influential standardization body in the whole world." His subgroup attempted for two or three years to formulate a definition of "flexible," but the endeavor was unsuccessful "because there was not enough agreement to reach a definition." Instead, the subgroup used and defined the terms "rigid," "semirigid," and "nonrigid." Reinhart also testified that although the dictionary definition of "flexible" was "not the same in the plastic industry," he knew people in that industry who have said it is the same.

The appellant introduced evidence that the kind of acrylic sheet here involved was marketed or described in sales and promotional literature not as flexible, but as rigid. That evidence, however, did not affirmatively establish a commercial meaning of flexible that differs from the dictionary definition.

In a recent case in which it was contended that the tariff items "clasps" and "sew-on fasteners" had commercial meanings different from their common meanings, we held that the appellant had "failed to establish commercial designations for those terms which are 'definite, uniform and general' throughout the United States. The opinion of [appellant's] witnesses, that the fasteners are not known as clasps or sew-on fasteners in the garment trade, is not conclusive proof of the required commercial meanings * * *." *Bar Zel Expediters, Inc. v. United States,* 698 F.2d 1210, 1212, (Fed. Cir. 1983). That principle applies equally in this case. The doctrine of commercial meaning reflects an assumed congressional intent to adopt for Customs purposes the accepted industry meaning of a term. A showing that the industry routinely uses the negative or opposite of the term is not sufficient to establish that Congress adopted the industry's view that a particular product is to be classified under a particular item.

Although the Court of International Trade did not explicitly find that the acrylic sheet here involved was flexible under the ordinary or dictionary meaning of that term, that determination was implicit in its decision upholding the classification. The court pointed out that the government's witness had observed two men at the importer's office flex a sheet of acrylic so that the ends touched without breaking the sheet, and that in a demonstration at the trial the witness, together with the appellant's counsel, had been able to bend acrylic sheets "to a great degree without breaking."

B. The appellant argues that the legislative history of the tariff provision at issue shows that Congress intended acrylic sheet to be classified under item 771.45 as "other" than "flexible." The argument is somewhat intricate, but there is no need to explicate it here. The legislative history of the Act of November 8, 1977, Pub. L. No. 95–160, 91 Stat. 1271 (amending the Tariff Schedules), shows

that Congress recognized that acrylic sheet might be classified as either flexible or nonflexible.

The Senate committee report stated: "Imports of flexible sheets of acrylic resin are now dutiable under TSUS item 771.42 [now 771.41] * * *. Imports of nonflexible sheets of acrylic resin are now dutiable under TSUS item 771.45 * * *." S. Rep. No. 419, 95th Cong., 1st Sess. 3–4, *reprinted in* 1977 U.S. Code Cong. & Ad. News 3369, 3371. Since in the 1977 amendment Congress made no change in the tariff provisions here involved, the inference is compelling that Congress intended that acrylic sheet could be classified either as "flexible" or as "other" than flexible (*i.e.,* nonflexible).

The legislative history contains an additional indication that Congress viewed the term "flexible" in these tariff items as carrying its common or dictionary meaning. In 1977 the chairman of the House subcommittee requested that "in order to clarify the dutiable status of acrylic sheets," the Customs Service give the committee "an explanation of our practice with respect to the term 'flexibility' as it applies to acrylic sheets classifiable under item 771.42." Letter from G.R. Dickerson to Representative Charles A. Vanik (July 13, 1977). In response, the Acting Commissioner of Customs stated that the agency's practice "is guided by" the *Sekisui* case. He then stated:

> The court's test is exceptionally broad and has caused some administrative difficulty. Further, it appears that as a result of the court's decision some merchandise is being treated as flexible for tariff purposes which was not so regarded by the framers of the tariff schedules.
>
> A quantitiative [sic] test, based on the modulus of elasticity in flexure would be easier to administer and lead to more consistent results.

Id. The "modulus of elasticity in flexure" test—under which these acrylic sheets would be classified as "other" than "flexible"—is the one the appellant urges as the proper basis for determining flexibility *vel non.*

Congress, however, made no change in these items, although it did change other parts of the tariff schedules. This failure to take any action in response to the government's suggestion that a change from the dictionary meaning in *Sekisui* would be appropriate, at least suggests that the Congress acquiesced in the *Sekisui* interpretation of the term "flexible."

The decision of the Court of International Trade is affirmed.

AFFIRMED

(Appeal No. 83-1067)

NICHIMEN CO., INC., APPELLANT *v.* UNITED STATES, APPELLEE

(Decided February 14, 1984)

Urban S. Mulvihill, of New York, New York, argued for appellant.

Saul Davis, of New York, New York, argued for appellee. With him on the brief were *J. Paul McGrath,* Assistant Attorney General, *David M. Cohen,* Director and *Joseph I. Liebman,* Attorney in Charge International Trade Field Office.

[Appealed from Court of International Trade Judge Newman.]

Before DAVIS, BALDWIN and KASHIWA, *Circuit Judges.*

BALDWIN, *Circuit Judge.*

This appeal is from a judgment of the United States Court of International Trade which sustained the separate classification of radio receiver chassis under item 685.24 TSUS and of tape players as machines, not specifically provided for (n.s.p.f.) under item 678.50. 565 F.Supp. 148 (Ct. Int'l Trade 1983). After a thorough consideration of appellant's arguments, we fully agree with the opinion of the Court of International Trade, filed by Judge Newman, and we affirm on the basis of that opinion.

Appellant's position is that the items in question should be classified as an entirety which would be eligible for duty-free treatment. The thrust of appellant's argument is that the chassis/tape combination is an entirety because the tariff description is for a machine n.s.p.f., and all the parts necessary to constitute a machine n.s.p.f. are present upon entry. Appellant's position cannot be maintained.

Judge Newman correctly summarized the law of the doctrine of entireties as set forth in *Stella D'Oro Biscuit Co., Inc.* v. *United States,* 65 CCPA 52, C.A.D. 1205, 570 F.2d 945 (1978), *aff'g, Stella D'Oro Biscuit Co., Inc.* v. *United States,* 79 Cust. Ct. 28, C.D. 4709, 436 F.Supp. 398 (1977) and *United States* v. *Baldt Anchor, Chain and Forge Div. of Boston Metals Co.,* 59 CCPA 122, C.A.D. 1051, 459 F.2d 1403 (1972):

> It is now well settled that separate components covered by the same entry, although designed and intended to be used together, are not properly classifiable as an entirety where the components do not comprise a complete commercial entity, but instead must be assembled with additional components to form a complete article of commerce. [565 F.Supp. at 151.]

Judge Newman found that the imported chassis and tape players were not sold by appellant in combination as complete commercial articles. Instead, the chassis and tape players were separately inventoried and used solely as parts along with other components in the production of various models of appellant's consoles and compacts. We find no clear error in these findings of fact. *Daw Indus-*

tries, Inc. v. *The United States,* 714 F.2d 1140 (Fed. Cir. 1983). We therefore agree with Judge Newman's conclusion that the chassis and tape players were separate tariff entities rather than entireties. We also agree that appellant's argument that the classification was inconsistent with prior administrative practice was not supported by the proffered testimony.

For the foregoing reasons, the judgment of the Court of International Trade is *affirmed.*

AFFIRMED

United States Court of International Trade

(Slip Op. 84–9)

SCHOTT OPTICAL GLASS, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 81-1-00030

Before MALETZ, *Senior Judge.*

(Dated February 2, 1984)

Opinion and Order

Fitch, King, and Caffentzis (*Richard C. King* and *James Caffentzis* on the briefs) for plaintiff.

Richard K. Willard, Acting Assistant Attorney General; *David M. Cohen,* Director, Commercial Litigation Branch; *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office (*Madeline B. Kuflik* on the brief) for defendant.

MALETZ, *Senior Judge:* At issue is whether importations of seven types of filter glass were properly classified by the government as other optical glass under item 540.67 of the Tariff Schedules of the United States (TSUS).[1] Plaintiff claims that the importations are not optical glass; rather, it contends that six of the seven types in question are properly classifiable under item 542.92 as "colored or special glass" and the remaining type properly classifiable under item 542.42 as ordinary glass.[2]

For the reasons that follow, the court concludes that the importations were correctly classified by the government under item 540.67 as other optical glass.

I

Description of the Imported Merchandise

Each of the seven types of filter glass is separately identified by invoice number, i.e., KG 4, WG 345, UG 1, UG 5, UG 11, RG 9, and RG 830. The KG 4 (slightly greenish in color) functions to absorb the near infrared light while allowing transmittance of visible light. It is used in cold light sources and in film projectors where it protects the transparency from being destroyed by heat. It is also used in sighting and aiming devices where it filters out infrared energy to maintain constant visibility of the ranges. All of these uses are in optical instruments.

---

[1] Item 540.67 is contained in Schedule 5, Part 3, Subpart A, TSUS (1980) and reads:

	Optical glass in any form, * * * synthetic optical crystals in the form of ingots, segments of ingots, sheets, or blanks for optical elements; all the foregoing not optically worked; polarizing material, in plates or sheets, not cut to shape or mounted for use as polarizing optical elements:	
	* * * * * * *	
540.67	Other optical glass and synthetic optical crystals; polarizing material.	23.1% ad val.

[2] The specific tariff provisions claimed by plaintiff are contained in Schedule 5, Part 3, Subpart B, TSUS (1980) which provides:

	Glass (whether or not containing wire netting), in rectangles, not ground, not polished and not otherwise processed, weighing over 4 oz. per sq. ft.:	
	Cast or rolled glass:	
	* * * * * *	
	Other, including blown or drawn glass, but excluding pressed or molded glass:	
	Ordinary glass:	
	* * * * * *	
	Weighing over 28 oz. per sq. ft.:	
	Not over 2½ sq. ft. in area	0.5¢ per lb.
	* * * * * *	
	Colored or special glass:	
	* * * * * *	
542.92	Weighing over 28 oz. per sq. ft.:	
	Not over 2½ sq. ft. in area	0.6¢ per lb. + 2.4% ad val.

The WG 345 (colorless) functions to absorb specific wavelengths in the ultraviolet and to transmit visible light. It is used in solar filter simulators which are optical instruments.

The UG 1, UG 5, and UG 11 all absorb visible light and part of the near infrared light and are distinguished only by darkness and lightness of color. They are used as substrates on interference filters and in spectrophotometers both of which are optical instruments.

The RG 9 absorbs visible white and ultraviolet light and transmits infrared light. It is used in spectrometers and spectrophotometers which are optical instruments.

The RG 830 is similar to the RG 9 and its use is the same; it differs in that it absorbs more visible light.

With the exception of the KG 4, the various glass types are used in astronomical instrumentation at the Kitt Peak National Observatory which is the United States' national center for groundbased optical astronomy.

II

Schott I and Stare Decisis

By way of background, it was determined in *Schott Optical Glass, Inc.* v. *United States,* 82 Cust. Ct. 11, 468 F. Supp. 1318, *aff'd,* 67 CCPA 32, 612 F.2d 1283 (1979) (*Schott I*) that the common meaning of the term "optical glass" as used in item 540.67 encompasses "glass which is: (a) very high quality, (b) used for optical instruments, and (c) capable of performing an optical function * * *" 67 CCPA at 33, 612 F.2d at 1285. Based on that determination, color filter glass in shades of red, green, blue, yellow and gray was held properly classifiable as optical glass under this provision. Plaintiff insists, however, that the *Schott I* determination of the common meaning of "optical glass" was clearly erroneous and thus not *stare decisis* here.

It is established that *stare decisis* is bottomed on the sound public policy that there must be an end to litigation and that, therefore, questions formerly determined should not be readjudicated except on a clear and convincing showing of error in the former holding. *United States* v. *Dodge & Olcott, Inc.,* 47 CCPA 100, 103 (1960); *United Merchants, Inc.* v. *United States,* CCPA 11, 14, 468 F.2d 208, 210 (1972). *See also e.g., United States* v. *Mercantil Distribuidora, et al.,* 45 CCPA 20, 23–24 (1957); *John C. Rogers & Co., Inc.* v. *United States,* 63 CCPA 10, 11, 524 F.2d 1220, 1221 (1975). Accordingly, the judicial determination of the common meaning of a term used in a statute becomes a matter of law which will be adhered to until a change in the statute necessitates a change in meaning or unless it is shown that the prior decision was clearly

erroneous. *United States* v. *Felsenthal & Co., et al.,* 16 CCPA 15, T.D. 42713 (1928). *See also Dodge & Olcott, Inc.,* 47 CCPA at 103.[3]

Given this background plaintiff asserts that the *Schott I* determination of the common meaning of "optical glass" is clearly erroneous in that its common meaning should be restricted (1) to glass of very high quality with respect to its properties of refraction and dispersion and (2) only to colorless glass chiefly used for lenses and prisms. But these same arguments were presented to the Court of Customs and Patent Appeals by this same plaintiff in *Schott I* and were rejected.[4] Thus, the court made clear that "high quality" was *not* limited to the optical properties of refraction and dispersion but included other optical properties such as absorption, transmission, reflection, polarization, fluorescence, emission, etc. Specifically, the court pointed out that "[w]hen a glass is selected for a particular property, the proper inquiry is whether the glass is of 'high quality' with respect to that property, and the quality with respect to other properties is immaterial." *Schott I,* 67 CCPA at 36, 612 F.2d at 1286.

Additionally, plaintiff's claim that the common meaning of "optical glass" is restricted to colorless glass chiefly used for lenses and prisms was likewise rejected in *Schott I.* For one thing, the importations there involved, though consisting of colored glass in shades of red, green, blue, yellow and gray, were nonetheless held to be "optical glass." And with regard to the contention that "optical glass" must be chiefly used for lenses and prisms, the *Schott I* court stated that "[i]n considering the common meaning of 'optical glass,' we note that the *Tariff Classification Study,* Schedule 5, Part 3, 128 (1960), states that 540.67 'covers: * * * (2) optical glass *other than* in the form of lenses or prisms * * *' [emphasis supplied]." 67 CCPA at 34–5, 612 F.2d at 1285.

In sum, it is concluded that on the basis of *stare decisis,* the common meaning of "optical glass" as determined in *Schott I* is controlling.

III

Whether the Importations Are "Optical Glass"

As we have seen the importations here, by virtue of their classification, are presumed to be (a) of very high quality, (b) used for optical instruments, and (c) capable of performing an optical function. In order to be successful in its claim, plaintiff has the burden of showing that the imported glass does not meet these criteria.[5] How-

[3] Res Judicata and collateral estoppel are not applicable in customs classification cases. Thus, a judgment in a customs classification case does not estop a subsequent action between the same parties involving the same merchandise and issues *United States* v. *Stone & Downer Co.,* 274 U.S. 225 (1927); *J. E., Bernard & Co. Inc.* v. *United States,* 66 Cust. Ct. 545, 549–50, 324 F. Supp. 496, 500–1 (1971).

[4] These arguments were also the subject of plaintiff's offer of proof at trial. R. 113–114.

[5] Item 540.67, under which the importations were classified, covers "optical glass," "synthetic optical crystals," and "polarizing materials." Plaintiff, relying upon *United States* v. *Miracle Exclusives, Inc.,* 69 CCPA —, —, 668

Continued

ever, based on the present record, it must be concluded that plaintiff has failed to meet this burden.

(a) *Very High Quality.* The record leaves no doubt that the imported merchandise is of very high quality. At the trial of the present case Dr. Karl Heinz Mader, a vice president of plaintiff, in charge of all corporate technical services, testified that the merchandise was manufactured with the same quality control features as the glass involved in *Schott I* (R. 170). In *Schott I* it was determined that glass is of very high quality if it is homogeneous and free from defects such as seeds, bubbles and striae. And as previously indicated, the concept of "high quality" refers to the specific property for which the glass is being used. Thus, in *Schott I,* the glass in question was of the highest quality of glass with respect to its absorption properties. Considering that the filter glass here involved is likewise used for its absorption properties, Dr. Mader's testimony that the quality of the glass involved here is the same as that involved in *Schott I,* underscores that the imported glass now before the court is of "very high quality" for the purpose of the "optical glass" definition.[6]

(b) *Used for Optical Instruments.* At the trial plaintiff's counsel conceded that the merchandise in question was used for optical instruments (R. 178). In fact, after this concession, the defendant released one of its witnesses who was present at the trial to testify on that very point (R. 177–178). Despite this, plaintiff now points out that although the imported merchandise is used for optical instruments, the test by virtue of General Interpretative Rule 10(e)(1) is one of *chief* use.[7] Applying this yardstick, plaintiff now argues that *defendant* has not "* * * met its burden of proving to what class or kind of articles the imported articles belong, nor the use of that class or kind of article."

There is no merit to the entire argument. In the first place, even assuming the test is chief use, it was plaintiff's burden to prove such use, not the defendant's. Second, plaintiff's attorney having conceded that the importations were used for optical instruments, that admission is binding and the question is no longer in issue. *Glick* v. *White Motor Company,* 458 F.2d 1287, 1291 (3d Cir. 1972);

F.2d 498, 499–500 (1981), insists that the government has lost its statutory presumption of correctness under 28 U.S.C. § 2639(a)(1) because the Customs Service's classification encompasses three categories, no one of which is implicit of the other. The argument has no merit. For there can be no doubt from the protest and the pleading that the government made clear, and the plaintiff fully understood, that the imported glass was classified by the Customs Service as "optical glass" and not as "synthetic optical crystals" or "polarizing materials." Thus here, unlike the situation in *Miracle Exclusives,* the government does not rely upon a Customs Service classification which embraces more than one category.

[6] Indeed, Dr. Mader testified that the imported merchandise was of "very high quality based on standards for filter glasses" (R. 180); in fact, he stressed that "it is the highest quality filter glass available" (R. 146).

[7] General Interpretative Rule 10(e)(i), TSUS, provides:

(e) In the absence of special language or context which otherwise requires—

(i) A tariff classification controlled by use (other than actual use) is to be determined in accordance with the use in the United Sttes at, or immediately prior to, the date of importation, of articles of that class or kind to which the imported articles belong, and the controlling use is the chief use, i.e., the use which exceeds all other uses (if any) combined;

* * * * * * *

Kelly v. *Fulkerson,* 275 F. Supp. 134, 138 (M.D. Pa. 1967), *aff'd,* 394 F.2d 463 (3d Cir. 1968).

(c) *Capable of Performing an Optical Function.* The third requirement for glass to be "optical glass" is that it be "capable of performing an optical function." As to this, plaintiff maintains that glass whose function lies outside the visible range of the electromagnetic spectrum is not capable of performing an optical function and, therefore, cannot be optical glass.

In our earlier description of the merchandise we listed the properties of the imported glass. The UG and RG types absorb nearly all visible frequencies of the electromagnetic spectrum so that a white material will appear nearly black to the human eye. Simply put, the UG and RG types affect the visible spectrum in that they absorb it. The WG type transmits the visible but absorbs all of a specific portion of the ultraviolet frequency while the KG type transmits the visible but absorbs the infrared frequency.

Both the WG and KG types appear clear or colorless and transmit nearly all the visible frequenceis so that a white sheet of paper viewed through them appear essentially white. Again, the visible spectrum is affected.

In this setting, plaintiff maintains that to be optical glass, the article must be capable of performing an optical function within the visible portion of the spectrum. Because the optical function performed by the importations are outside this visible portion, it follows, according to plaintiff, that the importations are not optical glass.

The difficulty with this argument is that in *Schott I,* the court did not limit the finding of an optical function to the visible range of the spectrum. On the contrary, the court made clear that "any effect visible in a material where light strikes it" is an optical effect and therefore includes absorption and transmission of light as optical properties even though absorption and transmissin do not necessarily operate in the visible portion of the spectrum. 67 CCPA at 36, 612 F.2d at 1286. It is true that in *G.A.F. Corp.* v. *United States,* 67 Cust. Ct. 167, C.D. 4269 (1971), this court concluded that the common use of "* * * the term 'optical', refers to the phenomena of light and vision, and an optical system of an instrument is one that aids vision or creates for inspection a picture or image of some object." *Id.* at 172. However, in view of *Schott I,* the *G.A.F.* determination is no longer controlling.

Lastly, plaintiff argues that the capable-of-performing-an-optical-function test is not a valid one and therefore invalidates the entire three-pronged test for optical glass set out in *Schott I.* On this aspect, plaintiff theorizes that unlike chief use, suitability for use, fitness for use, common usage, and dedication to use, capability of use is not accepted by tariff law as controlling classification. The reason, according to plaintiff, is that all glass performs optical functions when light strikes it since all light must either be reflect-

ed, absorbed or transmitted when it strikes an object. Since reflection, absorption and transmissions are optical properties, plaintiff notes that *any* glass is "capable" of performing one or more of these optical functions. Given this consideration, plaintiff insists that the *Schott I* test is invalid because it presents a situation whereby material is classified on the basis of a function of which it is theoretically capable, without regard to the predominant use or function for which it is intended and designed and for which it is actually used.

But in *Schott I,* the court, as previously indicated, made clear that "[w]hen a glass is selected for a particular property, the proper inquiry is whether the glass is of 'high quality' with respect to that property and the quality with respect to the other properties is immaterial." CCPA at 36, 612 F. 2d at 1286.

This demonstrates that the capable-of-use test is *limited* to the capability of the glass in question for the particular optical property under consideration. Thus, the capability test is entirely meaningful with regard to the particular property for which the glass in question is produced.

IV

Conclusion

For the foregoing reasons, the court sustains the government's classification and the action is dismissed. Defendant's conditional counterclaim based on statutory packing requirements for plaintiff's claimed classifications as colored, special or ordinary glass is dismissed as moot. Judgment will be entered accordingly.

HERBERT N. MALETZ,
Senior Judge.

(Slip Op. 84-10)

TRANSMARINE NAVIGATION CORP., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 76-9-02110

Before WATSON, *Judge.*

Memorandum Opinion and Order

(Decided February 3, 1984)

[The Court dismisses plaintiff's claim due to the failure to file a timely protest.]

Stein, Shostak, Shostak & O'Hara (Marjorie M. Shostak and *John N. Politis* at the trial; *James F. O'Hara* on the brief), for the plaintiff.

Richard K. Willard, Acting Assistant Attorney General; *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office, Commercial Litigation Branch *(Saul Davis* at the trial and on the brief), for the defendant.

WATSON, *Judge:* In this action, plaintiff Transmarine Navigation Corporation[1] contests the increased valuation of vessel repairs under a reliquidation[2] by the U.S. Customs Service.

The federal defendants take the position that the Court lacks jurisdiction to decide the merits of this claim due to plaintiff's failure to meet a statutory prerequisite for judicial review, specifically, the filing of a timely administrative protest

Transmarine filed its protest over five and one half years after the disputed reliquidation,[3] a period far in excess of the 60 day time limit then applicable under section 514 of the Tariff Act of 1930 (19 U.S.C. § 1514). Nonetheless, plaintiff argues that judicial review is appropriate under two theories. The first theory relies on the "voidness doctrine," a concept developed in a line of older cases in which the courts treated as timely certain protests filed after the statutory time period because the disputed liquidations were void *ab initio.* The courts reasoned that a statutory time limit could not run from the date of a liquidation that was legally non-existent. Plaintiff argues that it is free from the ordinary time limit for filing a protest because the disputed reliquidation lacked a finding of probable cause to believe there was fraud in the case.[4]

Although the "voidness doctrine" was in effect on the date of the entry in question,[5] the doctrine has no application here. The use of the "voidness doctrine" to salvage "untimely" protests was confined to cases where the authority under which the liquidation occurred was found to be illegal, or the reliquidation was done concededly without any authority whatsoever. *United States* v. *Cajo Trading, Inc.*, 55 CCPA 61, 403 F.2d 268 (1968), *cert. denied,* 393 U.S. 827 (1968) (void presidential proclamation); *United States* v. *C.O. Mason, Inc.*, 51 CCPA 107 (1964), *cert. denied,* 379 U.S. 999 (1965) (unconstitutional statute) *Guy B. Barham Co.* v. *United States,* 35 CCPA 138, C.A.D. 385 (1948).

In this case, there is no complaint that the authority under which the reliquidation occurred was non-existent. As a result, with regard to plaintiff's "voidness doctrine" argument, the Court's view is that this case merely presents a conventional challenge to the application of the law, for which no exceptional treatment is justified. *See U.S.* v. *A.N. Deringer,* 66 CCPA 50, 56.

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[1] Plaintiff Transmarine Navigation Corp. is the principal on the bond upon which entry of the vessel was made. The vessel was owned, at the time of entry, by American Sea Lanes, Inc.

[2] The government claims that, for a number of reasons, the increased valuation complained of occurred in the original and only liquidation of the subject entry. Without deciding the merits of this contention, the Court uses the term "reliquidation" to facilitate a clearer explanation of the procedural background of this case.

[3] The reliquidation occurred on April 11, 1969, and the protest was filed on November 25, 1974.

[4] At the time of reliquidation, Section 521 of the Tariff Act provided:

Reliquidation on account of fraud.

If the collector finds probable cause to believe there is fraud in the case, he may reliquidate an entry within two years (exclusive of the time during which a protest is pending) after the date of liquidation or last reliquidation.

[5] The case law "voidness doctrine" was eliminated by the passage of statutory amendments effective with respect to entries made on or after October 1, 1970. The subject entry was made on April 21, 1967. 19 U.S.C. §§ 1500(d) and 1514(a), *United States* v. *A.N. Deringer, Inc.* 66 CCPA 50, 56, C.A.D. 1220 (1979).

Plaintiff's second theory relies upon a tolling of the statutory time limit for protest until October 10, 1974, the date of a letter from the Customs Service which plaintiff views as the final agency action under the analysis developed in *Farrell Lines Inc.* v. *United States,* 496 F. Supp. 1320 (1980), *rev'd on other grounds* 657 F. 2d 1214 (1981). In *Farrell Lines,* the Court held that where an application for relief from duties on equipment and repairs to a vessel was followed by liquidation, and the shipowner petitioned for review, the statutory period for filing of a protest was tolled from the date of the petition until notice of denial of the petition by the Customs Service.

The relevant events in this case may be summarized as follows: On February 20, 1968, the vessel entry was liquidated. The shipowner, American Sea Lanes (ASL) informed the Customs Service on March 25, 1968 that it would file an application for relief requesting the amendment of entry. The application was filed on May 16, 1968. On April 11, 1969, Customs Service reliquidated the entry. ASL filed a petition for relief on May 15, 1969, which was provisionally denied by the Customs Service on June 24, 1969. A Supplemental Petition for relief filed by ASL on July 29, 1969 was denied and a first demand for duties was made by the Customs Service on August 8, 1969. Subsequently, ASL filed an additional supplemental petition, which was also denied.

On December 14, 1970, ASL protested ("appealed") the reliquidation. A denial of this protest, along with a second demand for payment occurred on February 17, 1971.

On May 9, 1973, the Customs Service made a demand for payment on the Plaintiff, Transmarine Navigation, the principal on the bond upon which entry was made. Plaintiff subsequently filed a petition for remission on July 3, 1973, which was denied by the Customs Service on September 27, 1973. A letter from plaintiff, dated September 27, 1973, arguing that the reliquidation was void, was rejected by the Customs Service on October 10, 1974, by a letter which Plantiff views as the final agency action under *Farrell Lines.*

In whatever manner the *Farrell Lines* analysis is applied to the chronology of events in this case, even the most generous view of the prolongation of the administrative process cannot go beyond the last date on which the Customs Service can be said to have addressed the merits of its dispute with ASL. The demand for payment made of Transmarine more than two years later did not revive the earlier dispute. It was simply the ministerial consequence of a final administrative decision.

Accordingly, plaintiff has failed to establish in any manner the Court's jurisdiction over this case. The Court's decision is harmonious with the general principle that administrative procedures already exhausted should not be reopened at a much later date, absent extraordinary circumstances. *See:* Section 514(a) of the

Tariff Act of 1930 (19 U.S.C. § 1514(a)); *Umpleby* v. *Udall*, 285 F. Supp. 25, 30 (D.C. Colo. 1968). Indeed, a series of petitions and protests could, if plaintiff's views are adopted, have the unreasonable effect of maintaining almost indefinitely an administrative appeal that has already clearly run its course.

For these reasons, this case is dismissed for lack of jurisdiction.

Dated: February 3, 1984, New York, New York.

JAMES L. WATSON,
Judge.

Decisions of th
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Abstracted Reappr

The following abstracts of decisions of the United
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decisions are not of sufficient general interest to print
to Customs officials in easily locating cases and tracing

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Abstracts

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DEPARTMENT OF THE TREASURY, *February 9, 1984.*

nited States Court of International Trade at New York are
fficers of the Customs and others concerned. Although the
print in full, the summary herein given will be of assistance
acing important facts.

WILLIAM VON RAAB,
Commissioner of Customs.

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS VALUA
R84/45	Re, C.J. February 3, 1984	Nissho Iwai American Corp.	78-12-02095	Export val
R84/46	Watson, J. February 3, 1984	Kreiss & Company	R63/10707	Export val

BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
ort value	Appraised values specified on entry papers by liquidating officer, less additions included which reflect currency revaluation	C.B.S. Imports Corp. v. U.S. (C.D. 4739)	San Francisco Not stated
ort value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	Los Angeles Not stated

Appeals to the U.S. Court of Appeals for the Federal Circuit

APPEAL No. 84-807—Greenhalgh Mills Corporation *v.* The United States—WATER JET LOOMS FROM CZECHOSLOVAKIA—Appeal from Slip Op. 83-126, filed on January 27, 1984.

Index

U.S. Customs Service

Court of Appeals for the Federal Circuit

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